IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.
JUDGMENT.

Krishna Gopal vs. Ramchandra & ors.

S.B. Civil Second Appeal No.126/1986 against the judgment and decree dated 22.7.1986 passed by the Civil Judge, Bhilwara in Civil Appeal No.21/1985.

Date of Judgment: May 11, 2006.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Ms. Rekha Borana, for the appellant.
Mr. R.Mehta & Mr. M.R.Mehta,for the respondents.

REPORTABLE

BY THE COURT:

Heard learned counsel for the parties.

The appellant is aggrieved against the judgment and decree of the trial court dated 18.4.1985 by which the suit of the plaintiff for eviction of the defendant from the suit premises was decreed on the sole ground of default in payment of rent for six months of the period immediately preceding the filing of the suit. The trial court before decreeing the suit, struck off defence of the defendant under Section 13 (5) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (for short “the Act of 1950”), as the defendant failed to pay the rent during pendency of the suit in time. The judgment and decree of the trial court dated 18.4.1986 has been upheld by the first appellate court by judgment and decree dated 22.7.1986.

Brief facts of the case are that plaintiff filed the composite suit seeking eviction of the tenant on the grounds, namely, default in payment of rent, sub-letting of the suit-premises by the tenant and the personal bonafide necessity of the landlord. Since one of the grounds for eviction of the tenant was default, therefore, the trial court determined the arrears of rent by order dated 23.1.1978 and directed the tenant to either pay or deposit the rent in the court. At that time both the parties agreed that arrears of rent may be calculated from the month March, 1977 despite the fact that the plaintiff filed the suit for eviction of the tenant with the allegations that the tenant has not paid the rent since January,1977. The plaintiff's plea that rent in the defendant is due from January,1977 was recorded in the order but it appears that to avoid any complication, the plaintiff agreed for determination of rent from March, 1977 and by the order, the court determined the interim rent starting from March 1977.

As per Section 13(4) and (5) of the Act of 1950, the tenant was under obligation to deposit the rent, arrears of rent within period of 15 days from the date of determination or within such further period not exceeding three months, as may be extended by the court. The tenant was under statutory obligation to deposit the subsequent rent during pendency of suit, month by month within a period of 15 days of each succeeding month of his tenancy. This period also could have been

extended upto the period of further 15days.

After determination of the rent, the tenant started depositing the rent. The suit proceeded and the trial court framed the issues on 21.5.1979 and thereafter on the plea taken subsequently by the defendant, new issue no.6 was also framed by the trial court on 16.8.1884. The newly framed issue was on the basis of the plea taken by the defendant under Section 14(3) of the Act of 1950 which bars the suit of the plaintiff on the ground of personal bonafide necessity if filed within five years from the date of letting out of the premises for commercial purpose. The plaintiff led his evidence and thereafter the defendant led his evidence. The trial court allowed the plaintiff to produce evidence in rebuttal. Then again evidence of the plaintiff and his witnesses was recorded in the trial court.

Before the trial court, the plaintiff submitted application under Section 13(5) of the Act of 1950 on 9.4.1981. By this application, the plaintiff submitted that the defendant did not deposit the rent in time as required under Section 13(4) of the Act of 1950.Therefore, the defendant's defence be struck off. No reply to this application was filed by the defendant and the trial court after hearing both the parties, by order dated 27.7.1982 held that the defendant has not paid the rent as required under Section 13(4) of the Act of 1950, therefore, he is not entitled to put forward his defence against eviction on the ground of

default. It appears that order dated 27.7.1982 was not challenged by the defendant and, therefore, defendant's defence against the eviction on the ground of default could not have been looked into and was not looked into by the courts below.

The plaintiff though led his evidence on all issues but during course of arguments before the trial court, the plaintiff did not press all other issues except issue on the ground of default. Meaning thereby, the plaintiff's suit remained only on the ground of default. Since the defence of the defendant was struck off by the court and the trial court held that the defendant committed default in payment of rent for more than six months for the period prior to filing of the suit by the plaintiff, therefore, the plaintiff is entitled for decree of eviction of the defendant-tenant on the ground of default under Section 13(1)(a) of the Act of 1950.

It will be worthwhile to mention here that before the trial court, the defendant during course of arguments, took a plea that the plaintiff has withdrawn the rent from the court which was deposited by the tenant after delay, therefore, by his conduct, the plaintiff has waived his right to seek eviction on the ground of default. The trial court rejected the defendant's said plea and thereafter decreed the suit.

The defendant preferred regular first appeal against the judgment and decree of the trial court. In the memo of appeal, the

defendant-tenant submitted that the defendant-tenant deposited the rent in time, therefore, the trial court committed serious error of fact as well as error of law in striking off the defence of the tenant-defendant. It was also submitted that since the rent was withdrawn by the plaintiff, therefore, he has waived his right to seek decree for eviction on the ground of default. The first appellate court after upholding the finding recorded by the trial court also took note of the alleged further defaults committed by the tenant during pendency of suit. However, the first appellate court even after taking note of the contention of the plaintiff about further defaults of the tenant, did not record any specific finding on the defaults committed by the tenant. However, since the findings of the trial court was upheld by the first appellate court, the first appellate court dismissed the appeal of the appellant by the judgment and decree dated 22.7.1986. As stated above decree was passed only on the ground of default as all other grounds taken by the plaintiff were withdrawn by him.

The present second appeal has been preferred by the tenant to challenge the judgment and decree of eviction and dismissal of the first appeal.

Following substantial questions of law were framed by this Court while admitting the appeal on 8.2.2002:-

> *"(1) Whether the bar of Section 14(3) of the Rajasthan Premises (Control of Rent and Eviction) Act*

would be attracted, even in cases where a suit for eviction relating to commercial premises is filed within a period of five years from the date of letting out on the ground of reasonable and bonafide necessity, coupled with other grounds enumerated in Section 13(1) of the Act as well ?

(2) Whether in the circumstances like the present case, the plaintiff gives up the grounds of reasonable and bonafide necessity and sub letting, can it be said that the suit, from the inception remained a suit for eviction only on the ground of default so as to absolve the defendant from the obligation of complying with the provisions of Section 13(3) and 13(4) of the Act?

(3) Whether the learned lower appellate court is right in holding that there is no waiver of the default committed by the tenant, notwithstanding the fact that the landlord has withdrawn the amount of rent deposited by the defendant from the Court simply because the amount was not directly paid to the landlord?"

And substantial question of laws framed by this Court on 12.4.2006 is as under:-

"Whether the two courts below passed the decree for eviction of the appellant-tenant on the ground of committing default in payment of rent for six months prior to filing of the suit, is based on no evidence."

So far as substantial question no.1 is concerned, the learned counsel for the appellant also agrees that Section 14(3) of the Act of

1950 is very clear and the suit on the ground of personal bonafide necessity alone is barred if filed within five years from letting the premises for commercial purposes. The plaintiff can maintain the suit for eviction of the tenant on all other grounds. That position is absolutely clear from Section 14(3) of the Act of 1950 itself and it specifically bars the suit for eviction of the tenant on the ground of personal bonafide necessity if filed within the period of five years from the date of letting out of the suit premises. Therefore, the substantial question no.1 is decided accordingly and it is held that suit of the plaintiff for eviction of his tenant for commercial purpose on the ground of default in payment of rent filed within five years from letting the premises is maintainable.

The substantial question no.2, in fact also does not survive in this appeal because of the simple reason that even if present suit is treated as a suit for eviction on the ground of default alone from inception because of withdrawal of all grounds of eviction by the plaintiff-landlord, the suit on the sole ground of default could not have been dismissed by the trial court after determination of rent and its deposit by the tenant in court. Section 13A of the Act of 1950 inserted by the amendment is also relevant because of the reason that in view of sub-clause (b) of Section 13A of the Act of 1950, the court is required to dispose of the suit of the landlord on deposit of the rent by the tenant,

whereas no such analogous provisions has been made under the provisions of Section 13(3), (4), (5), (6) and (7) of the Act of 1950 of disposal of the suit on depositing the rent by the tenant only. Section 13(3) and (4) are specific provisions for determination of rent and its deposit by the tenant during pendency of the suit. Section 13(4) of the Act of 1950 clearly provides that tenant shall deposit the rent till the suit is decided and that too, within the period as provided under Section 13(4) of the Act of 1950. Therefore, even if suit remains on the ground of default alone from the inception, the defendant is not absolved from obligation of complying with the provisions of Section 13(4) of the Act of 1950. The substantial question no.2 is, therefore, answered accordingly.

The whole thrust of argument of the learned counsel for the appellant is on issue no.3 and on the newly framed substantial question of law by this Court on 12.4.2006 which is to the effect that whether the two courts below passed the decree for eviction of the appellant-tenant on the ground of committing default in payment of rent for six months prior to filing of the suit, is based on no evidence. While arguing on these substantial questions of law, the learned counsel for the appellant vehemently submitted that in fact there is no pleading constituting the cause of action for seeking decree of eviction of the tenant on the ground of default. According to the learned counsel for the appellant, Section 13(1) specifically prohibits the court from passing any decree or

even any order of eviction of the tenant so long as tenant is ready and willing to pay the rent and secondly, unless it is proved that the tenant (a) has neither paid rent nor, (b) tendered the amount of rent to the landlord for six months. According to the learned counsel for the appellant, if the defendant proved that he was ready and willing to pay rent even then the decree for eviction of the tenant cannot be passed. It is also submitted that if the landlord failed to plead and prove that the tenant has not tendered the rent then also no decree for eviction of the tenant can be passed. It is also submitted that it is not the duty of the tenant to plead and prove that he has tendered the rent or he has paid the rent. According to the learned counsel for the appellant there are catena of the judgments laying down that it is the duty of the landlord to prove all the facts constituting cause of action and unless those facts are pleaded and proved, no decree in favour of the plaintiff can be passed. Therefore, whether the rent has not been tendered, is also a fact which should have been pleaded by the plaintiff specifically and mere saying that the rent has not been paid to the landlord-plaintiff by the tenant is not sufficient compliance for seeking decree under sub-clause (a) of sub-section (1) of Section 13 of the Act of 1950. For this the learned counsel for the appellant relied upon the judgments of this Court reported in Shyam Sunder vs. Moda Ram(1981 RLW 178) and B.B. Bhalla vs. Rameshwar Krishore Badhwar (2001(1) DNJ 298). The learned

counsel for the appellant also relied upon the judgment of this Court wherein it has been held that it is the duty of the landlord to prove any of the grounds for eviction of the tenant, out of the grounds which are given under sub-section (1) of Section 13 and those judgments are Mohan Lal vs. Lakhe Khan (1973 RLW 204) and Murlidhar v. Mukund Ram1993(2) RLW 549. It is also submitted that the plaintiff is required to prove the default of continuous six months prior to the filing of the suit as held in the case of Rishabh Chand vs. Veer Chand Jain (1989(1) RLR 567). The court is required to record a finding with respect to the default and mere interim determination of rent itself under Section 13 (3) of the Act of 1950 is not a finding of default of the tenant for the period prior to filing of the suit as held in the judgment of this Court reported in M/s Batliboi & Company Pvt. Ltd.(1981 RLW 225) and in support of her contention that burden lies upon the landlord, the learned counsel for the appellant further relied upon the judgment of the Hon'ble Apex Court reported in the case of M.K.Palaniappa Chettiar & anr. vs. A.Ponnuswami Pillai (AIR 1970 (UJ) SC 409).

To meet with the argument of the learned counsel for the respondent that the defendant admitted the default in payment of rent for continuous six months, therefore, there was no necessity of the plaintiff to lead evidence about the default committed by the tenant of six months prior to the filing of the suit, the learned counsel for the

appellant submitted that the admission cannot be inferred unless it is clear and unambiguous admission of fact. The defendant denied the allegation of default in the written statement. The Hon'ble the Apex Court in the case of Ram Autar Singh Bhadauria v. Ram Gopal Singh & ors.(AIR 1975 SC 2182) held in the facts of that case that the non-petitioner in the election petition in reply stated that the facts stated in the relevant part of the reply are wrong and not admitted, is a denial of fact and cannot be treated to be admission of the respondent in the election petition. The learned counsel for the appellant also relied upon the judgment of the Hon'ble Apex Court delivered in the case of Ramchandra G. Kapse v. H.R. Singh(AIR 1996 SC 817) wherein the effect of evasive reply of the defendant was considered by the Hon'ble Apex Court and the Hon'ble the Apex court held that written statement is required to be read as a whole or it can be found out whether there is even implied admission or not.

So far as waiver is concerned, the learned counsel for the appellant submitted that even the statutory right can be waived by any person. In this case and in the case where decree for eviction sought by the landlord on the ground of default, the landlord can waive his right to seek eviction decree expressly or impliedly. It is submitted that the landlord in this case accepted the rent of the default period, therefore, he waived his right to seek decree for eviction. The learned counsel for

the appellant submitted that this Court in the case of Madan Mohan vs. Madhu Sudan (1983 RLW 585) has considered the effect of accepting the rent by the landlord and same question was considered by this Court in the case of Hukam Chand vs. Madan Lal (1985(2) RCJ 520)= AIR 1986 (Raj.) 69). According to the learned counsel for the appellant, the rent is determined under Section 13(3) of the Act of 1950. The landlord may withdraw the rent from the court or accept the rent from the tenant and there may arise situation when the landlord after accepting or withdrawing the rent, moves application under Section 13(5) of the Act of 1950 for striking off the defence of the tenant and there may be situation where the tenant first moves under Section 13(5) seeking order of striking off defence and thereafter withdraws rent. In both the situations, as held in the above judgment, the landlord cannot seek decree of the eviction of the tenant because he waived his right by accepting or withdrawing the rent of the default period. So far as acceptance of rent or withdrawal of rent after order of striking off defence of the defendant, there cannot be waiver of the right of the landlord. The learned counsel for the appellant in support of his plea about waiver, also relied upon the judgment of this Court delivered in the case of Chetan Das vs. Annusuiya (1995(2) DNJ 686). The learned counsel for the appellant tried to distinguish the judgment of this Court (by me) delivered in the case of Krishan Kumar “Sorabh Bharti” vs. Paras

Ram (2004(5) WLC (Raj.) 677), wherein number of earlier judgments of this Court as well as of the Hon'ble Supreme Court were considered and, thereafter, this Court held that the Rent Control Act puts obligation upon the tenant to pay the rent to the landlord or deposit the rent in court so that the landlord may withdraw the rent and when in normal course the landlord accepts or withdraws the rent from the court, it itself, without there being any evidence to show that the withdrawal was with intention to waive his legal right, it cannot be presumed by this unintentional act or act under an impression that since the court has passed the order directing the tenant to pay the rent to the landlord himself and he is accepting the rent in compliance of the order of the court, by itself cannot be treated to be an expression of intention of the landlord that he has waived his legal right. According to the learned counsel for the appellant, in the said judgment, one of the earlier judgments of this Court delivered in the case of Madan Mohan(supra) has not been considered and though the judgment delivered in the case of Hukum Singh case(supra) was considered but that has not been distinguished or held to be wrong and the same is the position about the case of Chetan Das(supra) which was considered by this Court in the judgment of Krishan Kumar “Sorabh Bharti” (supra).

The learned counsel for the appellant on facts pointed out that the plaintiff first withdrew the rent and thereafter submitted

application for striking off the defence. Therefore, he waived his right by his this act. Thereafter, again after moving application under Section13(5) of the Act of 1950, the plaintiff withdrew the rent from the court and, therefore, at that time, he was conscious that the defence of the tenant can be struck off by the court but still he accepted the rent, therefore, he waived his right to seek eviction on the ground of default and the judgments of Mdan Mohan's case(supra) and Hukum Chand's case (supra) fully covers the issue involved in this case with respect to plea of waiver.

The learned counsel for the appellant also submitted that both the courts below committed serious error of law in decreeing the suit of the plaintiff as the decree has been passed without there being any evidence on the question of default. It is also submitted that mere striking off defence is not enough for passing a decree for eviction of the tenant, is a settled law.

The learned counsel for the respondent-plaintiff heavily relied upon the judgment of this Court delivered in the case of Krishan Kumar “Sorabh Bharti” (supra) and the latest judgment of the Hon'ble Apex Court delivered in the case of Sarup Singh Gupta v. S. Jagdish Singh & ors. (JT 2006(4) SC 277) and the earlier judgment of the Hon'ble Supreme Court delivered in the case of Mangilal vs. Sugan Chand Rathi (deceased) and another (AIR 1965 SC 101), where directly the question

of acceptance of rent by the landlord in the pending suit was involved and the Hon'ble Apex Court held that acceptance of rent by the landlord during pendency eviction proceeding, cannot be treated to be waiver of his right to seek decree of eviction under the provisions of the Act of 1950. The learned counsel for the respondents also pointed out that the earlier judgment of this Court delivered in the case of Hari Narayan vs. Badri Dass (1962 RLW 471) also declared that the acceptance of rent by the landlord in an eviction suit cannot amount to waiver of the right to seek eviction. This case was not brought to the notice of this Court when this Court decided the case of Krishan Kumar “Sorabh Bharti” case (supra) taking the same view.

The learned counsel for the respondents further submitted that Section19(3) of the Act of 1950 as well as Section 112 of the Transfer of Property Act also provides and specifically says that the acceptance of rent by the landlord during pendency of the eviction proceedings, shall not tantamount to waiver. Therefore, presumption of waiver cannot be drawn against the landlord because of mere acceptance of the rent. It is also submitted that the waiver is pure question of fact and for that purpose there must be specific defence by pleading specific facts and by showing that the landlord's intention was unambiguously clear to waive his right under the law.

I considered the submissions of the learned counsel for the parties

on these issues and also perused the plaint allegations and the defence taken by the defendant. The plaintiff in his plaint clearly stated that by 1.10.1977, the total amount of rent due in the defendant is Rs.630/-. He also pleaded that the rent of the premises is Rs.70/- per month. The plaintiff also pleaded that defendant no.1 has become defaulter as per law, obviously, as per the law which is applicable to the parties and that is sub-clause (a) of sub-section (1) of Section 13 of the Act of 1950. The plaintiff sought relief of recovery of said arrears of rent also amounting to Rs.630/-. The defendant in reply to the said pleading, stated that defendant paid rent after 1.1.1977 upto 1.3.1977. He further pleaded that said payment of rent has been entered by the plaintiff in his account book. By this, in reply to the allegation of default in payment of rent for nine months, the defendant, after giving dates specifically pleaded that the plaintiff has not given credit of rent of only two months out of six months for which the plaintiff claimed default of the tenant in payment of rent. The same was the stand in para no.16 of the written statement where the defendant again said that he has paid rent upto 1.3.1977, therefore, it is clear case of not denying the allegation of default in payment of rent at-least for seven months, which is from 1.3.1977 to 1.10.1977. It is not a case even of implied denial of allegation of default in payment of rent for more than six months prior to filing of the suit period. The meaningful reading of the reply

submitted by the defendant is clear admission of default in payment of rent. The pleadings make the other party aware of the allegations levelled against him so that he may take appropriate defence against the allegations levelled against him. The defendant, who was to take defence on the basis of the language used in sub-clause (a) of sub-section (1) of Section 13 of the Act of 1950, cannot plead his ignorance about the language of said section. The landlord can seek decree of eviction of the tenant. The plaintiff after pleading that rent of more than six months has not been paid by the tenant to the landlord and by that, the defendant-tenant has become defaulter in law, certainly means in accordance with the sub-clause (a) of sub-section (1) of Section 13 of the Act of 1950 and said decree can be passed only on fulfillment of the requirements under the said provision. The defendant could have several defences against the allegation of default as sought from the plaintiff. The defendant was also under obligation to disclose his all defences to the plaintiff so that the plaintiff would have contested the defences of the defendant. Some defences make the other party aware about the formal defects in the case set up by the plaintiff and some of the defects are curable defects. The suit cannot be dismissed if the defects are curable and are of formal character and if any objection would have been taken in time, then the plaintiff could have corrected that defect. If the defendant could have taken defence

about the lack of pleading, the plaintiff could have corrected the said defect (if it is defect at all). In view of the above, the plea which has been sought to be raised by the appellant in second appeal, after two judgments against him on the ground of lack of pleading, cannot be allowed to be taken, as the defendant was fully aware of the nature of the suit and contested it and lost in two courts and he has not suffered any prejudice because of framing of the suit.

It is clear from the pleading referred above that there is clear admission of default in payment of rent by the defendant in the written statement, therefore, it cannot be said that it is a case of no evidence with respect to the issue of default in payment of rent. Now the question arises whether in the facts and circumstances of the case, the plaintiff by accepting the rent of the default period, has condoned the default or waived his right of seeking the decree of eviction of the tenant. The issue was considered by this Court (by me) in the case of Krishan Kumar "Sorabh Bharti" and there is earlier judgment of this Court delivered in the case of Hari Narayan vs. Badri Dass (supra) and the judgment of the Hon'ble Apex Court delivered in the case of Mangilal vs. Sugan Chand Rathi(deceased)(supra). There is recent judgment of the Hon'ble Apex Court delivered in the case of Sarup Singh Gupta v. S. Jagdish Singh(supra). I do not find that the view taken by this Court in the case of Krishan Kumar "Sorabh Bharati"(supra) deserves

re-consideration. Rather in the light of the judgment of the Hon'ble Apex Court delivered in the cases of Mangilal vs. Sugan Chand Rathi (deceased)(supra) and Sarup Singh Gupta v. S. Jagdish Singh(supra) and the decision of this Court in Hari Nayaran vs. Badri Das (supra), it can safely be held that acceptance of rent by the landlord during pendency of the suit of the default period, cannot amount to waiver by itself.

So far as contention of the learned counsel for the appellant that the trial court committed error of law in striking out the defence of the appellant-tenant on the ground that the appellant deposited the rent after delay of one day, there appears to be some force because of the reason that the rent in fact could have been deposited upto 25.1.1979 and it was deposited on 25.1.1970 by the defendant but at the same time, the undisputed fact is that even during pendency of the suit itself, the defendant did not deposit the rent from 1.5.1981 to 30.11.1982 which is of 19 months and the same was deposited on 2.8.1984 and this fact has been admitted by the learned counsel for the appellant also. Therefore, even if the order striking out of the defence of the defendant is set aside because of deposit of rent by the tenant on 25.1.1979, this appeal is liable to be dismissed because of the reason that even defence of defendant is not struck off even then decree for eviction of defendant is inevitable due to non-payment of rent of 19 months during trial of the suit. The delay in depositing the rent cannot

be extended beyond the period given in the statute and in this case, there is no reason to condone the delay and default of 19 months in payment of rent. Rather say, the court has no jurisdiction to condone such delay.

In view of the above, the substantial question framed by this Court on 12.4.2006 is decided against the appellant and it is held that the landlord has not waived the default committed by the tenant by withdrawing the rent of the default period during pendency of the suit nor it is a case of no evidence with respect to the default committed by the defendant-tenant, rather it is a case of admitted default in payment of rent. It is further held that the defendant admittedly committed more defaults during the pendency of the suit, therefore, he cannot avoid decree of eviction.

Consequently, the appeal of the appellant is dismissed. No order as to costs.

(PRAKASH TATIA),J.

mlt.